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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

JAMES RICHARD ODLE, Petitioner, v. THE SUPERIOR COURT OF CONTRA COSTA COUNTY, Respondent; THE PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest.	A139719 (Contra Costa County Superior Court No. 24580)

BY THE COURT:[1]

Petitioner is a condemned prisoner at San Quentin awaiting a retrospective competency hearing based on a decision by the Ninth Circuit Court of Appeals and then, subsequently, this court. Here, petitioner argues that his counsel's motion to withdraw should have been granted and that his motion for a new appointed counsel under *Marsden*[2] was erroneously denied without a hearing. We issued a stay and asked for and received informal opposition and reply.[3]

[1] Before Kline, P.J., Haerle, J., and Richman, J.

[2] *People v. Marsden* (1970) 2 Cal.3d 118.

[3] Petitioner has also filed an application to file a supplemental exhibit, which we grant.

For several years, petitioner has been making *Marsden* motions and refusing to cooperate with his counsel, John Grele, or with the court as long as Grele remains on the case. He has submitted well over 100 *Marsden* filings, usually addressed to the District Attorney's office because he will not communicate directly with Grele and the court refuses to accept his letters believing it would be an ex parte communication. The situation has deteriorated to the point that petitioner has asked to not be brought to court (and instead left in San Quentin), has not cooperated with the appointed mental health expert who is to opine on the feasibility of the retroactive competency hearing, and has threatened to hurt himself or counsel when they are together.

Although counsel has renewed the motions since, the original motion was made on April 11, 2013. There, counsel attempted to present both his motion to withdraw and his client's *Marsden* motion, but the judge stated that "I'm hearing the motion to withdraw. I'm not hearing the *Marsden*." Counsel then stated that "the arguments I'm raising are applying to both motions. I felt it incumbent to raise the motion [petitioner] has made as well as raise my own motion with the Court." In doing so, counsel supplied the court with many if not all of petitioner's numerous *Marsden* motions and made an oral presentation. During his presentation, counsel explained that petitioner had lost part of his brain,[4] gets extremely agitated with counsel around, and (in counsel's opinion) is "under some sort of delusion about his representation." Specifically, counsel said petitioner does not understand "why issues about his mental capabilities were being discussed and which—which agitate him measurably."[5] Counsel also described

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[4] Our decision on appeal states that petitioner had surgery in 1973 because of a traumatic brain injury from a car accident that required removing a "grapefruit" sized "piece of the brain."

[5] Petitioner's inability to understand why his mental capabilities are prominent in the case is not surprising. According to the Ninth Circuit, the brain injury and surgery "left Odle 'a different guy,' one who appeared to be mentally unstable and out of control." (*Odle v. Woodford* (9th Cir. 2001) 238 F.3d 1084, 1087.) After the accident and surgery family described him as "seem[ing] confused and talk[ing] slowly, like a

petitioner as being combative and hurting himself (by pounding his head against the wall), behavior that the Ninth Circuit noted petitioner exhibited during an involuntary hospitalization prior to the capital crime. (See *Odle v. Woodard, supra,* 238 F.3d at p. 1088.)

Petitioner also addressed the court, at times in a rambling fashion and at others clearly hostile and upset. He explained that Judge Cram ordered that he receive transcripts ["[a]nd that's when the court order I won which I was supposed to get the transcripts and everything"], but it took a year to get them ["a whole year later I was still waiting on that transcripts—Still waiting"]. The transcripts finally arrived in an unmarked box, which terribly upset him: "And I get the transcript, it don't even have a return address on it. Judge Cram I'm sure is the one that caused this . . . . [¶] . . . The box it came in got poured into this other box. And then I get this box sitting here and it's a different officer bringing it. And he just he wants to put it in my cell and don't have nothing for me to sign or whatever. And I already stated anything that's coming from that one party I'm sending back. [¶] Somebody did a trick of some type to try to get me to get [the box of transcripts]. I really didn't even know it was [the] court transcript. But because it was legal [mail], there was nothing for me to sign, [so] I refused it. [¶] . . . [¶] I'm legally being fucked with. And you don't understand me." In response, the court told petitioner that it "was not going to tolerate that language." Petitioner responded: "Yeah, well , you can send me back" to San Quentin and "[t]he hunger strike is continued."

The court stated that the "[m]otion to withdraw is denied" without further explanation. The trial court later The trial court explained the basis for the ruling at the subsequent hearing on the motion to reconsider: "[T]his case is now almost 6 years down the road and the fact that we are so close to argument on the issues, the fact that Mr. Olde has been—obstreperous is probably not the correct word, obstructionist is more

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child; he had trouble controlling his impulses and often acted bizarrely and wildly." (*Id.* at pp. 1087-1088.)

the word in his activities in this matter, the court is not going to reward him with a new attorney. Therefore, this motion for consideration is denied."

"The determination of whether to grant or deny an attorney's motion to withdraw as counsel of record lies within the sound discretion of the trial court, having in mind whether such withdrawal might work an injustice in the handling of the case." (*Lempert v. Superior Court* (2003) 112 Cal.App.4th 1161, 1173.) Appointed counsel should be relieved where " ' "the record clearly shows that" ' " appointed counsel "is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result [citations]." [Citations.]' [Citation.]" (*People v. Memro* (1995) 11 Cal.4th 786, 857, overruled on other grounds in *People v. Gaines* (2009) 46 Cal.4th 172, 181, fn. 2..) But, to show an irreconcilable conflict a "[d]efendant cannot simply refuse to cooperate with his appointed attorney and thereby compel the court to remove the attorney." (*People v. Michaels* (2002) 28 Cal.4th 486, 523.) "A defendant may not effectively veto an appointment of counsel by claiming a lack of trust in, or inability to get along with, the appointed attorney. [Citation.] Moreover, the trial court need not conclude that an *irreconcilable* conflict exists if the defendant has not tried to work out any disagreements with counsel and has not given counsel a fair opportunity to demonstrate trustworthiness." (*People v. Smith* (2003) 30 Cal.4th 581, 606.)

The cases disallowing substitution of counsel because the defendant refused to cooperate with counsel are all premised on the refusal to cooperate being volitional. For instance, in *People v. Michaels, supra,* 28 Cal.4th 486, the defendant told the court that "his relationship with Grossberg [appointed counsel] had deteriorated to the point that defendant had ordered Grossberg not to contact him or anyone else concerning the case." (*Id*. at p. 522.) The trial court refused to remove counsel. (*Ibid*.) The Court of Appeal affirmed, finding that "[n]othing in the record here shows that Grossberg was incompetent or would not provide adequate representation if he received defendant's cooperation. But it is clear that he and defendant were in conflict that could imperil Grossberg's ability to provide effective representation. One consequence of the conflict

is that defendant refused to review his confession with Grossberg, depriving Grossberg of the opportunity to determine whether any part of it was untrue. [¶] But that does not demonstrate an 'irreconcilable conflict' that would require the trial court to replace appointed counsel. Defendant cannot simply refuse to cooperate with his appointed attorney and thereby compel the court to remove that attorney. ' " [I]f a defendant's claimed lack of trust in, or inability to get along with, an appointed attorney were sufficient to compel appointment of a substitute counsel, defendants effectively would have a veto power over any appointment and by a process of elimination could obtain appointment of their preferred attorneys, which is certainly not the law." ' [Citations.] [¶] Here the record suggests that defendant would not cooperate with any attorney not 'pre-cleared' by him and second counsel Mark Chambers." (*Id*. at p. 523.) Notably, there is nothing in the opinion indicating that the defendant was incompetent or refusing to cooperate because of mental illness.

Both *Michaels* and other published decisions on the issue focus on whether the defendant volitionally refuses to cooperate. Indeed, in *People v. Smith*, *supra*, 30 Cal.4th 581, the Supreme Court observed that "the trial court need not conclude that an *irreconcilable* conflict exists if the defendant has not tried to work out any disagreements with counsel and has not given counsel a fair opportunity to demonstrate trustworthiness." (*Id*. at p. 606.)

Here, there is no evidence in the record indicating that petitioner's obstruction is volitional. Indeed, the weight of the evidence makes clear that petitioner's bizarre, confrontational, and obstructionist behavior is not volitional; rather, the evidence points only in one direction—that his bizarre, confrontational, and obstructionist behavior is caused by the removal of a grapefruit-sized portion of his brain following a traumatic brain injury. And that irrational and bizarre behavior does not appear universal. Petitioner has meet with and approves of the public defender.[6] Indeed, petitioner told the

[6]Judge Cram apparently denied prior motions to be relieved because of her belief that petitioner would simply have the same complaints about any subsequently appointed

court he would be happy to proceed with the public defender with whom he met: "I've never had no problems with [the Public Defender's Office]. The only problems I've [ever] had with attorneys is since I've been condemned inmate with the people that are representing me now."

The facts here are surprisingly similar to *People v. Stankewitz* (1982) 32 Cal.3d 80 (*Stankewitz I*) and *People v. Stankewitz* (1990) 51 Cal.3d 72 (*Stankewitz II)*. There, in *Stankewitz I* , the Supreme Court "reversed the judgment from defendant's first trial on the ground that the trial court erroneously failed to hold a competency hearing pursuant to [Penal Code] section 1368." (*Stankewitz II*, 51 Cal.3d at p. 85.) Upon remand, the defendant was examined by a doctor who observed that the "defendant appeared to harbor paranoid delusions that his public defender was in collusion with the prosecutor." (*Ibid*.) Much like in this case, the evidence showed, in spite of his irrational belief about the public defender, "that defendant appeared to be capable of cooperating in his own defense with an attorney who was not a public defender." (*Ibid*.) The court heard and granted defense counsel's motion to withdraw prior to conducting the Penal Code section 1368 competency hearing; that hearing was then submitted by new counsel on the doctor reports and the trial court denied the motion as moot because all the evidence was that the defendant's incompetency was based on his paranoid delusions about the public defender, who was no longer counsel. (*Stankewitz II*, at pp. 86-87.) On appeal, defendant argued the court did not have jurisdiction to rule on the motion to withdraw and should not have conducted the competency hearing solely on the reports. Both claims were denied. (*Id*. at pp. 87-89.) While the *Stankewitz* cases do not support either party's position in this case, it does show that while the cause of petitioner's irrationality may be unique, the result is not. Here, as in *Stankewitz*, the mental condition of the defendant causes him to irrationally distrust one counsel to the point that the attorney-client relationship does not exist, but there is no reason to believe that the situation would repeat itself with another

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counsel. While those denials are not before us, that conclusion does not appear well-founded.

counsel—indeed, there is strong evidence that it will not repeat. Thus, the trial court erred in denying counsel's motion to withdraw.

The trial court also erred in failing to hear the *Marsden* motion. The motion was presented to the court and it, without stating a reason, said it would only consider the motion to withdraw. This issue, however, is moot given our conclusion on the motion to withdraw.

Let a peremptory writ of mandate issue commanding respondent to withdraw its order denying the motion to withdraw by petitioner's counsel and enter a new and different order granting the motion to withdraw. The stay previously imposed is dissolved upon filing of the remittitur. (See Cal. Rules of Court, rule 8.490.)